

REMARKS

Applicants have amended claim 1 to incorporate the limitations of claims 2 and 8, which have been canceled along with now-redundant claim 9. Applicants have also amended the dependency of claims 3 and 4 to be consistent with the cancellation of claim 2. Since the amendments above merely incorporate the limitations of pending dependent claims into a pending independent claim, they do not raise new issues and should be entered notwithstanding the finality of the pending Action. With the entry of the amendments above, claims 1, 3, 4 and 6 will be pending in this application.

The amendments above moot the rejections of record except as they pertain to prior claims 8 and 9, the limitations of which are now in claim 1. As a result, applicants will address the rejections only to the extent they are still relevant.

Claims 1, 2, 4 and 8 stand rejected under 35 USC 103(a) on Salib in view of Morris. The Examiner apparently reads Salib as disclosing that "the cover plates have abutment surfaces configured to lie against associated end plates of the vertebral bodies formed by transverse flanges, e.g., 50, on ventral edges of the cover plates relative to an implanted position." The Examiner takes the position that Salib discloses the invention as claimed except for the circular securing plates, separate from and not connected to the cover plates, which secures only one of the cover plates and is configured to be fastened to a ventral surface of one of the vertebral bodies, referring to Morris as disclosing such a structure in Figs. 1C, 3 and 4 and at page 3, lines 16-21. This rejection and its supporting reasoning are respectfully traversed.

The difficulty with this rejection is that it requires a person of ordinary skill in the art selectively to ignore portions of the structures disclosed in the prior art in order to arrive at the claimed invention. Furthermore, the Examiner has misread Salib in making the rejection.

Although the Examiner identifies tab 50 (and presumably tab 30 as well) as corresponding to the transverse flanges providing abutment surfaces configured to lie against associated end plates of the vertebral bodies, the tabs 30, 50 of Salib are not configured to abut

against end plates of vertebral bodies, but rather are configured to allow for the screwing of screws 42 through the tabs and into the vertebral bodies. The tabs 30, 50 of Salib do not correspond to the claimed abutment surface formed by a rear side of a transverse flange.

Instead, although Salib teaches a prosthesis that has tabs having a rearward facing stop surface, it is configured to abut against the ventral edge of the vertebrae, not the end plates as claimed, thus preventing a dorsal dislocation of the prostheses. In order to prevent ventral dislocation, Salib provides screw holes in the tabs and screws going through the tabs for fastening at the vertebrae. This concept of "screw-secured tabs" firmly locks the prosthesis in place. Although Salib's solution might appear to be good at first glance, it has drawbacks. Firmly locking means rigidity. However, a living human moves, and, as a consequence, the vertebrae move relatively to each other. This movement of the vertebrae, e.g., in the course of normal neck movements, tends to cause micro-movements of the prosthesis, creating considerable loads on a rigid fastening. Eventually, the prosthesis will come loose. In contrast, by securing the prosthesis with a separate element as claimed, the separate securing plate gives a less rigid fixation that is much more capable of taking the loads of micro movements as explained at page 2, lines 15-31, of the specification. Salib teaches a fixation of maximum rigidity, and the invention claims just the opposite. The Examiner has failed to demonstrate why a person of ordinary skill in the art would have looked to Salib to assist in making a device with a securing plate that is not attached to the cover plates of the prosthesis.

Morris does not overcome this deficiency of Salib, since it does not disclose transverse flanges formed on ventral edges of the cover plate, but instead uses retaining plate 20, which corresponds to the claimed securing plate. Given the manner in which the structure of Morris is put together, there would have been no reason for a person of ordinary skill in the art to use Salib's tabs 30, 50 in addition to the retaining plate of Morris, as would have been necessary to arrive at the claimed invention. For the prosthesis itself Morris does not provide any fixation means, so it can move within certain limits and is only protected against ventral dislocation.

Morris thus employs a zero rigidity fixation system, which is the opposite of Salib's concept. Persons of ordinary skill in the art would not have been motivated to combine two disclosures based on totally different fixation concepts except with hindsight knowledge of applicants' invention. As a result, the combination of Salib and Morris cannot render the subject matter of the claims unpatentable, and the rejection should be withdrawn.

Claims 3, 6 and 9 stand rejected under 35 USC 103(a) on Salib and Morris in view of Van Hoeck. Since Salib and Morris do not provide the disclosures for which they are cited, and would not have motivated persons of ordinary skill in that art to make the claimed invention, this rejection should be withdrawn. Applicants also note again that the securing plate of Van Hoeck is the antithesis of the claimed securing plate in that it is fastened to both cover plates, contrary to the requirements of claim 1. As explained in applicants' previous response, no person of ordinary skill in the art would have been motivated to look to Van Hoeck to solve any problem with securing plates that are not connected to the cover plates.

As before, by responding substantively to the Examiner's application of Van Hoeck as prior art, applicants are not conceding that Van Hoeck is prior art. Van Hoeck is available as prior art only if its claims as published are supported in both its parent and grandparent applications; the published Van Hoeck application is a CIP of a CIP, so it is quite possible that Van Hoeck is available as prior art under 35 USC 102(e) only as of April 1, 2004, precisely one year after the U.S. filing date of this application. Although it is the Examiner's burden to establish that prior art cited in an Action is properly citable, the pending Action does not deal with the issue of the effective date of Van Hoeck as prior art.

Early action allowing claims 1, 3, 4 and 6 in this application is solicited.

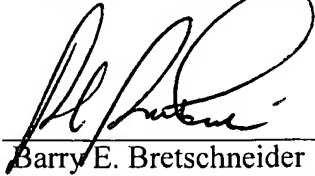
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Respectfully submitted,

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